IN THE HIGH COURT OF DELHI

CM(M) No. 1011/2007

Daya Sapra ..... Petitioner
! through: Mr. Sunil Satyarathi, Advocate
Mr. Raman Gandhi, Advocate

VERSUS

$ Vishnu Dutt Sharma ..... Respondent
^ through: Mr. J.S.Kanwar, Advocate

RESERVED ON: 03.12.2007

% DATE OF DECISION: 14.12.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**
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1. An interesting question of law arises for consideration in the instant petition. It concerns the inherent power which a court of justice must possess to prevent misuse of its procedures in relation to an action initiation whereof may apparently be not inconsistent with the literal application of the law but otherwise would be manifestly unjust and unfair to the defendant amounting to an abuse of the process of law. In turn the question encompasses the scope of the principle of res

judicata: Is Section 11 of the Code of Civil Procedure 1908 exhaustive of the sweep of res judicata? How is the principle of res judicata impacted by Sections 40 to 43 of the Indian Evidence Act 1872? Do the inherent powers of the court permit it to striffle a suit, cause whereof was *an essential* part of a prosecution for an offence under Section 138 of the Negotiable Instruments Act 1881 in particular when the suit is sought to be litigated with the *same quality and quantity* of evidence as formed the basis of the prosecution for the offence under Section 138 of the Negotiable Instruments Act 1881?

2. Explaining res judicata and its twin effect, *George Spencer Bower* in his treaties "The Doctrine of Res Judicata" IInd Edition, page 1, has to say:-

> "I. In English jurisprudence a *res judicata,* that is to say a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto, disposes once and for all of the matters decided, so that they cannot afterwards be raised for re-litigation between the same parties or their privies. The effect of such a decision is two-fold.
>
> *Parties estopped from averring to the contrary*
>
> 2. In the first place, the judicial decision estops or precludes any party to the litigation from disputing, against any other party thereto, in any later litigation, the correctness of the earlier decision in law and fact. The same issue cannot be raised again between them, and this principle extends to all matters

> of law and fact which the judgment, decree, or order necessarily established as the legal foundation or justification of the conclusion reached by the Court.
>
> *Transit in rem judicatam*
>
> 3. In the second place, by virtue of the decision the right or cause of action set up in the suit is extinguished, merging in the judgment which is pronounced. *Transit in rem judicatam.* The result is that no further claim may be made upon the same cause of action in any subsequent proceedings between the same parties or their privies."

3. The term '*res judicata*' and the term '*estoppel by record*' have at times been used (indiscriminately if I may beg to use the expression) to signify either, or both, resultant effect of binding nature of a final judicial decision pronounced by a court of competent jurisdiction. Spencer Brown however explains that it would be advisable to distinguish the two as: *estoppel per rem judicatam;* and*, transit in rem judicatam.*

4. Two reasons support the jurisprudence of res judicata. First the general interest of the society/community in termination of disputes by according finality and conclusiveness to judicial decisions. Secondly to protect the right of individuals from vexatious multiplication of suits and prosecutions at the instance of an opponent. The former is public policy and is succinctly expressed in the maxim '*interest (or expedit) reipublicae ut sit finis litium*'. The latter is private

justice and is reflected in the maxims '*nemo debet bis vexari pro una et eadem causa*' and in connection with criminal litigation '*nemo debet bis vexari pro uno et eodem delicto*'.

5. In para 13 of his publication, George Spencer Bower has following to write:-

> "13. The applicability of the rule both to civil and criminal proceedings, both to decisions of courts of record and to those of other judicial tribunals, and both to English and to foreign *res judicatae,* is justified by, and rests upon, the same theoretical basis of public policy and private justice."

6. Since, in its applicability, the twin aspects of res judicata striffle the second action, the identity of the subject matter of the previous decision assumes significance. On the identity of the subject matter, in Chapter VI *George Spencer Bower* opines:-

> "184. It is of the essence of all estoppels that there shall be two statements of the same fact exhibiting *inter se* an essential contradiction or discrepancy; the result of the application of the doctrine of estoppel is always that the earlier statement is to be taken as the truth, precluding an assertion of the later. There can be no estoppel *per rem judicatam* unless a substantial discrepancy is shown to exist between the *res judicata* and the case set up in the subsequent proceedings; and no such discrepancy can be shown to exist unless these two relate to the *same* subject matter.
>
> 185. It follows that, in strictness, the burden is on the party setting up the estoppel of alleging and establishing this identity of subject-matter - that is to say, that his

> opponent is seeking to put in controversy and re-agitate some question of law, or issue of fact, which is the very same question or issue which has already been the subject of a final decision between the same parties by a tribunal of competent jurisdiction. Where there are no pleadings or particulars, the identity of the subject matter of the two decisions must be established by evidence."

7. A decision imports a two fold judicial act. In relation to the grant or refusal of a claim prayed for, it settles the question of law between the parties and additionally settles issues of fact between the parties.

8. In relation to the binding nature of the decision qua issues of fact between the parties it becomes imperative to view the previous action and the cause on which it is laid for only those issues of law and fact which are its essential foundation, without which the decision cannot stand, are alone capable of being used as the basis of res judicata between the parties when a second action is set up. Coleridge J, in the decision reported as *R. V. Hartington, Middle Quarter (Inhabitants)* (1855) 4 E & B 780 put the point with precision and lucidity when he wrote:-

> "the judgment concludes not merely to the point actually decided, but as to matter which it was necessary to decide and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue..... is conclusive not merely of the facts directly decided but of those facts which are necessary steps to the decision..... are so cardinal to it that

> without them it cannot stand. Unless they are necessary steps, the rule fails and they are collateral facts."

9. Sankey L.J. In the report published as *Jaeger Co. Ltd. Vs. Jaeger* (1929) 46 RPC 336 expressed as under:-

> "Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case actually decided by the court and appearing from the judgment itself to be the ground on which it was based."

10. Section 11 of the Code of Civil Procedure, 1908 has been held to be not the sole repository and exhaustive of the principle of res judicata. They decisions to said effect are numerous and I need not catalogue them. Suffice would it be to guide the anxious reader to AIR Commentaries by W.W.Chitaley & V.B.Bakhale on "The Code of Civil Procedure" under Note 3.

11. Applicability of the principles of res judicata to both civil and criminal proceedings have been recognised by George Spencer Bower. (Refer para 5 above.) Decision by courts of competent criminal jurisdiction have been held to be res judicata in subsequent civil actions in New Zealand. In the decision by Chapman J reported as *Banks Vs. Wilson* (1910) 29 N.2 L.R. 832 where a magistrate had dismissed, on merits, a complaint made under sections 9 and 10 of the Impounding Act 1908 asking for an award of damages for an alleged illegal impounding of cattle, the claimant was thereby held estopped for subsequently suing in a civil court for damages. *Estoppel*

per rem judicatam was applied.

12. The decision of the House of Lords 1982 A.C. 529 *Hunter Vs. Chief Constable of the West Midlands Police & Ors*. also affirmed the applicability of principle of res judicata in a subsequent civil action where the previous decision was of a competent court at a criminal trial.

13. The decision is interesting as it gave a broader horizon to what constitutes an abuse of the process of the court and used the first principle on which res judicata is founded i.e. public policy to hold that if facts warrant, public policy can be applied at a latter civil action in relation to a prior decision at a criminal trial to strike off a claim under inherent powers of the court.

14. The facts may be noted as reproduced in the head note in *Hunter's* case.

15. After bomb explosions in two Birmingham public houses on November 21, 1974 had killed 21 people and injured 161 others, the appellant and four others, Irish Republican supporters, were arrested by the Lancashire police and taken to Morecambe Police Station. On November 22, members of the Birmingham police interviewed the five men, and one of them made a signed statement. They were then taken to a Birmingham police station, where a sixth man was also taken

after his arrest at 10:30 p.m. that night. On November 23, at the Birmingham police station, three more of the men made signed statements and the two others made oral confessions regarding their parts in planting the bombs that had caused the explosions. On November 24, all six men were photographed, and the photograph of one man showed a mark that might have been a bruise under the right eye. On Monday, November 25, the six men appeared before a magistrates' court, and, although three of them complained to the solicitors assigned to them of assaults by the police, no marks were noticed on their faces save in the case of the man with black eye, which he said had been caused by a fall. After formal evidence, the six men were remanded in custody and taken to Winson Green Prison. When, three days later, on November 28, they again appeared at the magistrates' court, their faces showed injuries that indicated they had been seriously assaulted. They were again remanded in custody, and first the prison governor and then the Home Office held an inquiry as to how their injuries had been sustained. At the trial of the six men on 21 charges of murder, their counsel objected to the admission in evidence of their statements, which were an essential part of the prosecution case, on the ground that they had been induced by violence and threats by the police. After an eight day “trial

within a trial" (voir dire) in the absence of the jury, during which the police officers and the six men gave evidence, Bridge J. held that the prosecution had discharged the burden of proving beyond reasonable doubt that the men had not been assaulted by the police and that the statements had been voluntary and should be admitted in evidence. The trial then continued before the jury, and the six men again alleged that their statements had been induced by violence by the police. Bridge J. warned the jury that, if their allegations were, or might reasonably be, true, the statements were worthless. The jury convicted all six, and Bridge J. sentenced them to imprisonment for life. Leave to appeal was refused by the Court of Appeal (Criminal Division) on March 30, 1976. The six men issued writs against the chief constables of the West Midlands and the Lancashire police and also against the Home Office claiming damages against the police for injuries caused by assaults, which were the same allegations as had been made before Bridge J. at the voir dire and trial, and also against the Home Office in respect of assaults by prison officers and prisoners while they had been in Winson Green Prison. They relied, inter alia, on new medico-forensic evidence as to the photographs taken on November 24, which were said to reveal that some injuries had been sustained prior to that date, and statements

from the three prison officers that the six men had been bruised and injured on their arrival at the prison. The chief constables applied for the statements of claim against them to be struck out under R.S.C., Ord. 18, r. 19 and under the inherent jurisdiction of the court. Cantley J. dismissed the applications, but the Court of Appeal allowed an appeal by the chief constables and ordered that the statements of claim be struck out.

16. Dismissing the appeal against the decision of the Court of Appeal, the House of Lords speaking through Lord Diplock held:

> "That where a final decision had been made by a criminal court of competent jurisdiction it was a general rule of public policy that the use of a civil action to initiate a collateral attack on that decision was an abuse of the process of the court; and that such fresh evidence as the plaintiff sought to adduce in his civil action fell far short of satisfying the test to be applied in considering whether an exception to that general rule of public policy should be made, which, in the case of a collateral attack in a court of coordinate jurisdiction, was whether the fresh evidence entirely changed the aspect of the case."

17. At page 539, Lord Diplock noted that in the civil action, on receipt of summons, the police sought the statement of claim to be struck of by pleading that what had happened at the murder trial gave rise to an estoppel per rem judicatam of a kind which in recent years it had been found convenient to describe as "issue estoppel". The fact that even if what had

happened did not create as against the plaintiff in favour of the police what could be strictly classified as "issue estoppel" it nevertheless made the initiation of the present civil action against the police an abuse of the process of the court.

18. Noting thereafter that the trial judge Cantley J. dismissed the application for a summary rejection of the claim holding that estoppel by judgment was not attracted but Court of Appeal held to the contrary, at page 540 Lord Diplock held:-

> "Nevertheless it is my own view, which I understand is shared by all your Lordships, that it would be best, in order to avoid confusion, if the use of the description "issue estoppel" in *English law, at any rate* (it does not appear to have been adopted in the United States), were restricted to that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies, of which the characteristics are stated in a judgment of my own in *Mills v. Cooper* (1967) 2 Q.B. 459, 468-469 that was adopted and approved by his House in *Reg. v. Humphrys (1977)* A.C. 1, the case in which it was also held that "issue estoppel" had no place in English criminal law."

19. But it was held that the civil action was an abuse of the process of the court. Reasoning is to be found in the following passages :-

> "My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the

judgment of A.L.Smith L.J. in *Stephension v. Garnett* (1989) 1 Q.B. 677, 680-681 and the speech of Lord Halsbury L.C. in *Reichel v. Magrath* (1889) 14 App. Cas. 665, 668 which are cited by Goff L.J. in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A.L.Smith L.J.:

> ".....the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court."

The passage from Lord Halsbury's speech deserves repetition here in full:

> ".....I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

x x x x x

My Lords, this is the first case to be reported in which the final decision against which it is sought to initiate a collateral attack by means of a civil action has been a final decision reached by a court of criminal jurisdiction.

x x x x x

This raises a possible complication that the onus of proof of facts that lies upon the prosecution in criminal proceedings is higher than that required of parties to civil proceedings who seek in those proceedings

> to prove facts on which they rely. Thus a decision in a criminal case upon a particular question *in favour* of a defendant, whether by way of acquittal or a ruling on a voir dire, is not inconsistent with the fact that the decision would have been *against* him if all that were required were the civil standard of proof on the balance of probabilities."

20. Referring to the probative weight of evidence and where the subsequent civil action was predicated on the same evidence as was considered at the criminal trial, Lord Diplock concluded the decision as under :-

> "There remains to be considered the circumstances in which the existence at the commencement of the civil action of "fresh evidence" obtained since the criminal trial and the probative weight of such evidence justify making an exception to the general rule of public policy that the use of civil actions to initiate collateral attacks on final decisions against the intending plaintiff by criminal courts of competent jurisdiction should be treated as an abuse of the process of the court.
>
> I can deal with this very shortly, for I find myself in full agreement with the judgment of Goff. L.J. He points out that on this aspect of the case Hunter and the other Birmingham Bombers fail in limine because the so-called "fresh evidence" on which they seek to rely in the civil action was available at the trial or could be reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a court of competent jurisdiction, and he adopts as the proper test that laid down by Earl Cairns L.C. in *Phosphate Sewage Co. Ltd. v. Molleson* (1879) 4 App. Cas. 801, 814,

> namely that the new evidence must be such as “entirely changes the aspect of the case.” This is perhaps a little stronger than that suggested by Denning L.J. In *Ladd v. Marshall* (1954) 1 W.L.R. 1489, 1491 as justifying the reception of fresh evidence by the Court of Appeal in a civil action, viz., that the evidence “... would probably have an important influence on the result of the case, though it need not be decisive;....”
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> The latter test, however, is applicable where the proper course to upset the decision of a court of first instance is being taken, that is to say, by appealing to a court with jurisdiction to hear appeals from the first-instance court and whose procedure, like that of the Court of Appeal (Civil Division), is by way of a rehearing. I agree with Goff. L.J. that in the case of collateral attack in a court of coordinate jurisdiction the more rigorous test laid down by Earl Cairns is appropriate.
>
> I need not repeat Goff L.J.'s critical examination of the “fresh evidence” which Hunter sought to adduce in his civil action for assault. It fell far short of satisfying either test.
>
> I would dismiss this appeal.”

21. Thus where:-

a. The facts were directly in issue and formed the groundwork of the decision, in that, they were necessary steps at the adjudication of the criminal trial;

b. The facts were decided by the Criminal court;

c. The facts appear from the judgment itself to be the ground on which it was based; and

d. The quality and quantity of the evidence at the civil

trial intended to be led was the same as at the criminal trial; would be the test to be applied and satisfied before the civil action can be thrown out as an abuse of the process of the court.

22. The interplay of Sections 40 to 42 of the Indian Evidence Act 1872 was considered by their Lordships of the Hon'ble Supreme Court in the decision reported as (2002) 8 SCC 87 *K.G.Premshanker Vs. Inspector of Police & Anr.* In para 30 and 31 it was held:-

> "30. What emerges from the aforesaid discussion is – *(1)* the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; *(2)* in civil suits between the same parties, principle of res judicata may apply; (3) in a criminal case, Section 300 Cr.P.C makes provision that once a person is convicted or acquitted he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.
>
> 31. Further, the judgment, order or decree passed in a previous civil proceedings, if relevant, as provided under Section 40 and 42 or other provisions of the Evidence Act then in each case, the court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein. Take for illustration, in a case of alleged trespass by *A* on B's property, *B* filed a suit for declaration of

> its title and to recover possession from *A* and suit is decreed. Thereafter, in a criminal prosecution by *B* against *A* for trespass, judgment passed between the parties in civil proceedings would be relevant and the court may hold that it conclusively establishes the title as well as possession of *B* over the property. In such case, *A* may be convicted for trespass. The illustration to Section 42 which is quoted above makes the position clear. Hence, in each and every case, the first question which would require consideration is- whether judgment,order or decree is relevant, if relevant-its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon the facts of each case." (Underlining by way of emphasis)

23. Thus, decision attracting Section 41 of the Indian Evidence Act 1872 would ipso facto be binding in subsequent proceedings, but decisions attracting Section 40 and Section 42 would have to be considered as to their binding or conclusive nature with reference to the foundational facts of the prior and the subsequent action. This has been emphasized by the Hon'ble Supreme Court in the first sentence in para 31 of the decision in *K.G.Premshankar's* case (supra).

24. A Division Bench decision of this court reported as *Gulab Chand Sharma Vs. Shri H.P.Sharma* ILR (1974) Delhi 190 opined as under :-

> "Conflicting judicial decisions may be found cited in commentaries under section 40 to 43 of the Indian Evidence Act, section 403 Cr.P.C. and section 11 Civil Procedure Code as to whether a decision in a suit would act as res judicata in a criminal trial and vice-versa. In

our view, the general principle of res judicata is based firstly on public policy and secondly on private justice both of which apply to all judicial proceedings whether civil, criminal or otherwise. Public policy general interest of the community litigation must come to an end and its conclusion must have a finality. Private justice requires that an individual should be protected from vexations multiplication of suits and prosecutions at the instance of an opponent whose superior power and resources may enabic him to abuse the process of court. The principle of *res judicata* should, therefore, apply equally to civil and criminal proceedings inasmuch as the decisions of courts in both the proceedings are justified by and rest upon "the same theoretical basis of public policy and private justice" (Spencer-Bower and Turner on *Res Judicata* 2nd Edition paragraph 13).

(9) In *Gulabchand v. State of Gujarat* A.I.R. 1965 S.C. 1153, it was contended that the decision in a previously decided writ petition should not act as *res judicata* in a subsequently instituted suit between the same parties inasmuch as the scope of a suit is different from the scope of the writ petition. The Supreme Court, however, held that the principle of *res judicata* would apply and at page 1160 paragraph (29):-

> "The difference in the nature of the two proceedings is immaterial if the matter decided *inter parties* in one proceeding is the same which is to be determined in the subsequent proceedings and the parties to the suit were also parties to the writ petition."

Shri A. N. Mulla for the petitioner contends that an earlier decision can be looked into only for the purposes of sections 40 to 43 of the Indian Evidence Act and if not admissible thereunder, it cannot be used. While the general principle of res judicata is treated as a part of the principle of estoppel in 15 Halsbury's Laws of

England part II section 11 pages 191 onwards, the principle is partially embodied in three different statutes in India namely-section 11 CPC, sections 40 to 43 Indian Evidence Act and section 403 Cr.P.C. But none of these provisions exhaust the scope of the general principle of *res judicata*. Each of them is limited to its own purpose. None of them therefore cut down the rest of the principle of *res judicata*. The three essentials of the general principle of *res judicata* may be stated as follows:-

1. A decision by a Competent Judicial Tribunal which is final,

2. it must determine the same questions as are sought to be controverted in the litigation in which the plea of *res judicata* is raised, and

3. parties to the proceedings in which the plea of *res judicata* is raised must be the same as were parties to the decision which acts as *res judicata.*

Therefore, when section 40 of the Evidence Act says that "the existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial" as being a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial, it refers not only to the statutory law but to the non-statutory general law of *res judicata* also. Therefore, either the general principle of *res judicata* is not cut down by sections 40 to 43 or it is expressly recognised by section 40.

25. A few paragraphs on the Negotiable Instruments Act

1881.

26. Section 118 thereof reads as under:-

“**118. Presumptions as to negotiable**

instruments – Until the contrary is proved, the following presumptions shall be made:-

(a) of consideration – that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date – that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance - that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer – that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of endorsements – that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps – that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course – that the holder of a negotiable instrument is a holder in due course: provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

27. In the decision reported as AIR 1961 SC 1316 *Kundan Lal Rallaram Vs. Custodian Evacuee Property* it was held that presumption under Section 118 is one of law and thereunder a court shall presume, inter alia, that the negotiable

instrument or the endorsement was made for consideration. In effect it throws the burden of proof of failure of consideration on the maker of the negotiable instrument.

28. By Act No. 66 of 1988 Chapter XVIII consisting of Sections 138 to 147 was inserted in the statute book with effect from 1.4.1989.

29. Sections 138 and 139 read as under:-

> "**138. Dishonour of cheque for insufficiency, etc., of funds in the account** – Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless -
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
>
> (b) The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as

unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

139. Presumption in favour of holder – It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

30. Section 139 mirrors the presumption which already existed under Section 118 of the Act.

31. Pertaining to a cheque, at a criminal trial for an offence under Section 138 of the Act, the complainant has to prove that:

a. The accused is the drawer of the cheque.

b. That the cheque, when presented for encashment was returned unpaid by the bank on which it was drawn.

c. Reason for return was insufficiency of funds to the credit of the account of the drawer or that the cheque amount exceeded the amount arranged to be paid from that account by an agreement between the bank and the drawer.

d. That the cheque was presented within its validity.

e. That by a written notice issued within 30 days of receipt of information of return of the cheque demand was made to make good the payment regarding the unpaid cheque.

f. That within 15 days of the receipt of said notice the payment was not made.

32. The drawer has then to prove that the cheque was neither in discharge of a debt or a liability.

33. Be it a civil action or a criminal action, pertaining to dishonoured cheques the presumption of law is in favour of the holder of the cheque that it was issued for good consideration. Onus of proving failure of consideration is on the person who has issued the cheques.

34. The forum and the action whether civil or criminal may be different but the substance of both actions is likely to be the same. There is greater presumption of complete identity of the matter which is necessary to be decided and the groundwork of the decision meaning thereby the necessary steps are cardinally the same. Ex-facie, there exist stronger grounds to invoke the legal principles of res judicata when issue has been held in favour of an accused on merits at a criminal trial pertaining to a prosecution under Section 138 of the NI Act 1881 when a civil suit is filed on the same cause i.e. the same cheque. I clarify, if at the criminal trial the accused has successfully rebutted the onus that the cheque was for a consideration i.e. in discharge of a debt or a liability or part thereof and has earned an acquittal which has attained finality

and the suit is filed alleging same facts as were alleged in the criminal complaint, prima facie, it would be an abuse of the process of law as explained in *Hunter*'s case (supra).

35. Thus, in such a situation it becomes imperative to carefully view not only the point actually decided at the criminal trial for the offence under Section 138 of the NI Act but also the matter which was necessary to be decided and which was actually decided as also the ground work of the decision itself. For if the subsequent civil action raises same questions of law and fact which have already been disposed of and same set of evidence with same probative value is sought to be used, the civil action would be an abuse of the process of the law.

36. Reverting to the facts of the instant case it may be noted that the respondent filed a complaint under Section 138 of the NI Act impleading the petitioner as the sole accused. In the complaint he pleaded as under:-

> "CRIMINAL COMPLAINT U/S. 138 OF THE NEGOTIABLE INSTRUMENTS ACT, READ WITH SECTION 420-I.P.C.
>
> Sir,
>
> It is most respectfully submitted as under:-
>
> 1. That the complainant is a peace-loving and law abiding citizen of the State and has been residing at the above mentioned address.
>
> 2. That on 10th August, 1999, the accused borrowed a loan of Rs.1,50,000/- (Rupees one lac

fifty thousand only) from the complainant and the accused promised to repay the said amount of loan within two months.

3. That on demand of the complainant, the accused gave a cheque of worth Rs.1,50,000/- (Rupees one lac fifty thousand only) on 20th October, 1999 vide cheque No.324162 pertaining to Vijaya Bank, Delhi.

4. That on 22nd October, 1999, the complainant presented the above cheque in his bank Oriental Bank of Commerce Shahdra, Delhi, but the cheque was received back with remarks, "INSUFFICIENT FUNDS"

5. That the complainant approached the accused and expressed his sorrows as the cheque was received back with the above remarks.

6. That the accused asked the complainant to present the cheque after the expiry of one week and ultimately, the complainant presented the cheque on 3rd November, 1999 but the same was again returned with the above remarks.

7. That on the request of the complainant, the complainant presented the said cheque on 15th November, 1999 and on 10th December 1999 but every time the cheque was returned back with the remarks "INSUFFICIENT FUNDS".

8. That in this way, the accused intentionally avoided to make the payment of Rs.1,50,000/- which were bad on the part of the accused.

9. That the accused committed the offence punishable U/s.138 of the Negotiable Instruments Act read with Section 420-I.P.C.

10. That the complainant sent a legal notice dated the 10th December, 1999 to the accused in this regard but nothing has come out and the accused has suppressed the same.

11. That the complainant shall suffer an irreparable

loss and injury, if the accused is not summoned, tried and punished according to law.

12. That the photocopy of the above notice is being filed herewith this complaint.

13. That the complainant has got no other alternative or efficacious remedy except to seek the intervention of this Hon'ble Court to get justice.

14. That the accused has committed offence punishable within the jurisdiction of this Hon'ble Court and as such this Hon'ble Court has got jurisdiction to entertain this complaint.

Under the circumstances, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to summon, try and punish the accused persons according to law, in the interest of justice.

Prayed accordingly."

37. Defence taken by the petitioner was that the respondent had met her husband who was a property dealer in connection with some business and that respondent alleged that pertaining to same land deal the police had to be bribed and that on 10.8.1999 the respondent accompanied by one Mr. Malhotra a retired ACP and his son came to the office of her husband and forcibly took the cheque in question from her husband since the cheque book was with her husband.

38. The petitioner successfully established the defence by producing witnesses. The respondent could not even lead any evidence to establish that he had Rs.1.5 lacs with him on the day he alleged to have advanced the loan. Indeed, no

receipt or acknowledgment evidencing the loan was proved.

39. Vide judgment dated 26.9.2003 the petitioner was exonerated by the learned ADJ who decided the criminal complaint holding that the petitioner successfully rebutted the presumption that the cheque was for a valuable consideration by successfully proving that no loan was ever advanced and that the cheque in question was physically lifted under coercion and threat.

40. Respondents challenge to the decision of the learned Trial Judge was unsuccessful when, vide order dated 4.12.2003 in Crl.M.A.153/2003 leave to appeal was declined by a learned Single Judge of this Court.

41. In the plaint which has now been instituted, case pleaded by the respondent is as under:-

> "SUIT UNDER ORDER XXVII CPC 1908 FOR RECOVERY OF RS.2,04,000/-
>
> Most Respectfully Showeth:-
>
> 1. That the plaintiff is a peace loving and law abiding citizen of India and has been residing at the above mentioned address.
>
> 2. That on 10/08/1999 the defendant borrowed a loan of Rs.1,50,000/- from plaintiff and the defendant promised to repay the amount of loan of within 2 months.
>
> 3. That on demand of the plaintiff, the defendant issued a cheque of worth Rs.1,50,000/- on 20/10/1999 vide cheque No.324162 pertaining to Vijay Bank, Delhi.

4. That on 22/10/1999, the plaintiff presented the above cheque in his bank, O.B.C., Shahdara, Delhi for encashment but the same was dishonoured by the defendant bank on the defendant issued the cheque with malafide intention.

5. That the plaintiff approached the defendant and expressed his sorrows as the cheque was received bank with the remark “Insufficient Funds”.

6. That the defendant asked the plaintiff to present the cheque after the expiry of one week and ultimately, the plaintiff presented the cheque on 03/11/1999 but the same was again returned unpaid.

7. That on the another request of the defendant, the plaintiff represented the said cheque on 15/11/1999 and on 10/12/1999 but every time the cheque was returned back with the remarks “Insufficient Fund”.

8. That the defendant issued the above noted cheque fraudulently to avoid the payment.

9. That on 18/12/1999, the plaintiff served upon the defendant a legal notice through his counsel to repay the above loan amount within 15 days. The said notice was duly served upon the defendant. the defendant filed to repay with the said notice.

10. That the defendant has filed to repay the amount of friendly loan of Rs.1,50,000/- which was taken by the defendant from the plaintiff a sum of Rs.1,50,000/- with interest @ 12% p.a. while remain due from the defendant while is defendant is liable to pay the same to the plaintiff.

11. That the defendant is also liable to pay interest @ 12% p.a. from the date of notice till realization as 54,000/- and a sum of Rs.1,50,000/- is due from 22.10.1999 to 19.10.2002 from the defendant on account of interest.

12. That the defendant is liable to pay Rs.1,50,000/- on account of loan amount taken by

the defendant from the plaintiff and Rs.54,000/- on account of interest thereon. Thus in all the defendant is liable to pay Rs.2,04,000/- to the plaintiff.

13. That no relief which does not full within the ambit of this rule has been claimed in the plaint.

14. That the present suit is filed upto XXXVII of C.P.C.1908.

15. That the cause of action to the suit arose to the plaintiff on 10/08/1999 when the defendant had taken loan and failure of the defendant to pay the same inspite of repeated request and demands. The cause of action finally arose as the same of the notice dated 18/12/1999 and failure of the defendant to comply with the same. Hence, the suit.

16. That the parties to the suit resides and work for gain at Delhi the loan amount taken by the defendant at Delhi and as such this Hon'ble Court has the jurisdiction to try and decide the present suit.

17. That the value of the suit for the purpose of court fee is Rs.2,04,000/- as which the requisite court fee has been affixed.

It is, therefore, most respectfully prayed that a decree of recovery of Rs.2,04,000/- along with interest @ 12% p.a. from the date of suit till the realization be passed in favour of the plaintiff and against the defendant. Cost of the suit be also awarded in favour of the plaintiff and against the defendant."

42. Ex-facie, the plaint is a virtual repetition of the same version as was set out in the criminal complaint. The respondent has not made any fresh averment pertaining to the circumstances under which the cheque in question reached his hands. Ex-facie, the suit is based on the same cause and the

averments therein are sought to be established with reference to the same evidence and relates to the same point as was the evidence and the point in issue before the learned criminal court.

43. In my opinion the suit is an abuse of the process of the law. The principle of public policy expounded in *Hunter*'s case is fully applicable.

44. I note that the learned Trial Judge who has dismissed the application filed by the petitioner for rejection of the plaint has considered the issue with reference to the strict principles of res judicata as traditionally understood in relation to the binding nature of a previous decision by a court of civil jurisdiction in the context of a subsequent civil action. Probably for the reason, learned counsel for the petitioner did not draw the attention of the learned Trial Judge to the general applicability of principles of res judicata and in particular when can a subsequent civil action be held to be an abuse of the process of the court.

45. The petition is allowed. The impugned order dated 17.3.2007 is set aside.

46. I hold that the suit filed by the respondent is an abuse of the process of the law and requires to be rejected at the threshold.

47. Ordered accordingly.

48. No costs.

December 14, 2007 PRADEEP NANDRAJOG
VG/MM JUDGE